U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 29 September 2006

BALCA Case No.: **2005-INA-00157**
ETA Case No.: P2002-CA-09538049/JS

In the Matter of:

NATURE'S ENVY,
Employer,

on behalf of

ADIELA CUELLAR CARDONA,
Alien.

Appearance: Frank E. Ronzio, Esquire
Los Angeles, California
For the Employer and the Alien

Certifying Officer: Martin Rios
San Francisco, California

Before: **Burke, Chapman and Vittone**
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification for the position of Floral Designer. [1] The CO denied the application and Employer requested review pursuant to 20 C.F.R. §656.26.

[1] Alien labor certification is governed by Section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). This application was filed prior to the effective date of the "PERM" regulations. *See* 69 Fed. Reg. 77326 (Dec. 27, 2005). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2004), unless otherwise noted.

STATEMENT OF THE CASE

On April 12, 2001, Employer, Nature's Envy, filed an application for labor certification to enable the Alien, Adiela Cuellar Cardona, to fill the position of Floral Designer. (AF 64). The salary was $11.90 per hour. Employer specified two years of experience in the job offered, which was described as follows:

> Transform verbal instructions/specifications into sketches/drawings & create and construct lifelike artificial plants/trees & period pieces for special high end applications in the interior design industry, wholesale/commercial sale, and residential decorations. Company carries various lines of products & will design/fashion artificial arrangements for events. Plan arrangement utilizing knowledge of design & properties of materials. Selects flora & foliage necessary for arrangements. Trims material/arranges bouquets, sprays, wreaths, dish gardens, terrariums & other items using wire, pins, floral tape, foam, trimmers, cutters, shapers/other materials & tools. Must be familiar with flower & plant names, proper care & handling of flowers. 10 Openings for consideration.

On September 10, 2004, the CO issued a Notice of Findings ("NOF") proposing to deny certification on the grounds that Employer had failed to show that U.S. workers were rejected for lawful, job-related reasons, that there was a restrictive combination of duties, and that Employer had failed to show that two years of experience was its true minimum requirement for the position. (AF 58). Specifically, the CO found that the one applicant who applied appeared to be qualified for the position, as her resume revealed about seven years of experience as a floral designer. Employer indicated it had sent the applicant certified mail on October 30, 2002, and when she did not reply, had telephoned her on November 18, 2002 and left a message; however, the certified mail receipt provided by Employer was not filled out and no certified return receipt was provided. Without evidence that the applicant had received the letter, the CO found that Employer should have made additional attempts to contact her sooner than November 18th. The CO also found Employer's statement that he left a message to be insufficient as well, as there was no evidence that this applicant received the message. The CO directed that Employer's Rebuttal needed to establish a good faith recruitment of this applicant.

The CO also determined that the position at issue did not appear in any single Dictionary of Occupational Titles ("DOT") job description, and therefore required a combination of duties. The unduly restrictive combination was that of floral designer, DOT 141.081-010 and commercial designer or illustrator, DOT 141.161-038 or 141.061-022. The CO found that Employer failed to establish that it normally employed persons to perform this combination of duties and/or that workers customarily performed the combination of duties in the area of intended employment, or that the combination resulted from business necessity. Employer was directed to revise the job duties, justify the combination of duties or, if such employment was normal or customary, document the same.

The CO also questioned whether the two years of experience required as a floral designer was the Employer's true minimum requirements, as the ETA 750B did not clearly indicate that the Alien had this experience prior to her hire. Employer was directed to amend the ETA 750B to show the complete address of the Alien's previous employer, and the months in which she started and ended her employment with that employer. If the documentation did not establish the requisite amount of experience, then Employer needed to amend the excess experience requirement and agree to retest the labor market. If Employer wished to retain the requirement, it needed to provide convincing justification that it was not now feasible to hire anyone with less than this requirement, or document that the occupation in which the Alien was hired was dissimilar from the occupation for which Employer was seeking labor certification, or document that the Alien had obtained the experience elsewhere.

Employer submitted rebuttal on October 11, 2004. (AF 37). Employer contended that it was an artificial plant manufacturing business servicing very high-end markets with custom design products. In order to perform the duties of a floral designer, a qualified candidate had to have the skills to transform verbal instructions/specifications into sketches. According to Employer, it was critical to have one individual who could prepare the sketches/drawings as well as the sample of the artificial plant, tree or floral arrangement for the customer. It would be impractical to have more than one worker doing these duties, as clients would be extremely frustrated having to give verbal instructions to one individual, then communicate with a second

individual who was constructing the sample, with the instructions that may have been understood by the illustrator, not being understood by the floral designer. The Employer argued that this would lead to a loss of business. Employer argued that it has always employed floral designers who had the ability to do this combination of duties. Employer indicated that if the Department of Labor was not willing to accept the above, Employer was willing to revise the job duties and eliminate the requirement to transform verbal instructions into sketches, and retest the labor market. Employer also amended the ETA 750B to indicate that the Alien had two and a half years of the requisite experience prior to her hire. Copies of passports and permanent resident cards were also included.

An affidavit from Employer's founder and president was also part of the rebuttal, in which the founder attested to the attempts to contact the one U.S. applicant, who according to Employer, was sent a letter by certified mail, with the return receipt to be mailed to Employer's attorney. (AF 40). The affidavit further stated that there was a strong assumption that the applicant received the letter because it was not returned by the post office, the return receipt never reached the attorney, and an attempt to contact the applicant by telephone was also made. Employer asserted that a telephone message was left for the applicant to contact Employer, but she never responded.[2]

A Final Determination was issued on December 21, 2004. (AF 29). The CO noted that Employer's rebuttal stated, for the first time, that the return receipt was to go to its attorney, not the Employer. Employer's rebuttal, according to the CO, was "in the third person passive voice regarding who sent the contact letter and who made the subsequent telephone call." The CO pointed out that the lack of a return receipt meant there was no knowledge as to whether or when the contact letter was received, and as the NOF advised, without such knowledge, only one telephone call was not sufficient -- that one telephone call, placed on November 18th, having also been too late. The CO also found that the Rebuttal failed to provide documentation of a vigorous good faith attempt to recruit this applicant. The CO found that while Employer indicated its

[2] Employer's affidavit also discusses attempts to contact an applicant in another labor certification case it has pending. This, however, is not relevant to the issues at hand.

willingness to retest the labor market without the restrictive combination of duties, Employer failed to document that the U.S. worker who applied was rejected solely for lawful, job-related reasons, and therefore labor certification should be denied.

On January 24, 2005, Employer's Request for Review of a Denial of Certification was filed. (AF 1). This matter was then forwarded to the Board of Alien Labor Certification Appeals ("BALCA" or "Board").

DISCUSSION

In its Request for Review of a Denial of Certification, Employer argues that it documented good faith efforts to contact this applicant, as the standard is reasonable efforts, and not proof of actual contact. According to Employer, it need only establish that its overall recruitment efforts were in good faith. That the return receipt was to be delivered to the attorney does not alone invalidate the recruitment process, according to Employer. Employer argues that the CO is improperly requiring proof in the form of certified mail receipts to establish that actual contact was made with the applicant, and that the CO improperly determined that one telephone call was not sufficient and too late, given that the State Employment Agency and the Department of Labor, prior to recruitment, did not provide instructions describing Employer's obligation to try alternative means of contact if one type of contact did not work.

Employer, however, was advised by the Employment Development Department that applicants "must be contacted within fourteen calendar days of receipt of the resume(s)" and that a delay in applicant contacts may result in a finding that recruitment was not conducted in good faith. (AF 82). The applicant in question wrote on September 5, 2002, submitting her resume and advising that she was currently working full-time, and that the Employer should feel free to contact her at her telephone number or by e-mail. (AF 75). Employer did neither in a timely fashion, choosing instead to send a certified letter two weeks after receipt of her letter and making a telephone call over a month after receipt of the letter. It appears that Employer

deliberately failed to make contact in the manner suggested by the applicant or in a timely fashion.

Employer has the burden of production and persuasion on the issue of lawful rejection of U.S. workers. *Cathay Carpet Mill, Inc.*, 1987-INA-161 (Dec. 7, 1988)(*en banc*). In *Bay Area Women's Resource Center*, 1988-INA-379 (May 26, 1989) (*en banc*), it was held that where the employer only attempted to contact a U.S. applicant at one of three possible telephone numbers and no attempt was made to contact her by mail, the employer's two messages did not constitute reasonable efforts to contact a qualified U.S. worker. It is Employer's obligation to make all reasonable attempts to contact applicants as soon as possible. *Creative Cabinet & Store Fixture Co.*, 1989-INA-181 (Jan. 24, 1990) (*en banc*).

In the instant case, there was only one applicant to be considered, and the means which would most likely have guaranteed contactwere not utilized by Employer. The one resume at issue was forwarded to Employer on October 23, 2002. (AF 69). Employer sent a certified letter on October 31st, but did not attempt telephone contact until November 18, 2002, and never attempted contact by e-mail as suggested by the applicant. The efforts made do not appear to be reasonable in light of the circumstances of this case. Therefore, Employer has failed to establish good faith recruitment and labor certification was properly denied. Accordingly, the following Order shall issue.

ORDER

The Final Determination of the Certifying Officer denying Labor Certification is **AFFIRMED**.

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board
of Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of Board decisions; or (2) when the proceeding involves a question of exceptional importance. Petitions for review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400 North
Washington, D.C., 20001-8002.

Copies of the petition must also be accompanied by a written statement setting forth the date and manner of that service. The petition must specify the basis for requesting review by the full Board, with supporting authority, if any, and shall not exceed five double-spaced typed pages. Responses, if any, must be filed within ten days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition the Board may order briefs.